United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

529

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

Docket No. 22,063

AARON S. THOMAS,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SISK, LEVITAN, CRAMER & WEINSTEIN

M. Michael Cramer
Attorney for Appellant by
Appointment of this Court

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 3 1969

Nathan J. Paulson
CLERK

STATEMENT OF QUESTION PRESENTED

Where a police officer unlawfully arrests a citizen for a misdemeanor not committed in his presence or view, should not evidence seized under the arrest be suppressed?

I N D E X

CITATIONS

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

AARON S. THOMAS	]	
Appellant	]	
vs.	]	Docket No. 22,063
UNITED STATES OF AMERICA	]	
Appellee	]	

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

Appellant, Aaron S. Thomas, having duly waived his right to Jury Trial, was convicted by the Court of possession of narcotic drugs in violation of Title 26, U.S.C. Section 4702(a) and facilitation of concealment and sale of a narcotic drug, knowing that the said drug was imported contrary to law, in violation of Title 21, U.S.C. § 174, (p. 24 of the Transcript of Proceedings, Judgment and Committment).

The Court sentenced Appellant to serve a term of eighteen months to five years on Count I of the Indictment and five years on Count II of the Indictment, said sentences to run concurrently. (Judgment and Committment). Appellant

was allowed by the District Court, to proceed with this Appeal without prepayment of costs. (See Order of Appeal, p. 26 of the Transcript of Pleadings.)

STATEMENT OF CASE

The charge against Appellant of unlawful possession of narcotics, arises from a search made of Appellant when the police arrested him for attempted unlawful entry of a building. The Appellant was arrested along with two others who were charged with unlawful entry. Appellant elected to be tried without a jury in the United States District Court for the District of Columbia. (See, Waiver of Trial by Jury, page 17 of Transcript of Pleadings.)

Private Stanley R. Walker of the Metropolitan Police Department testified that on March 12, 1967, at about 10:30 a.m., he and his partner, Pvt. Robert Tewes, placed the Appellant, along with John W. Harper and Leroy M. Wilson, under arrest for unlawful entry of premises 917 - 9th Street, S. E., Washington, D. C. (TR 4 and 5). Officer Walker testified that he was traveling south on 9th Street in his police car, and as he passed 917 - 9th Street, he heard a loud noise. He stopped his vehicle and backed up and was able to observe the Appellant, together with his

two friends, standing in a public walkway near the rear of these premises. (TR 5 and 6). Premises 917 - 9th Street, S. E., was so constructed that a passage way several feet in width ran completely through the center of the house. The second floor of the house constituted the ceiling of the passageway (TR 5). The officer testified that premises 917 - 9th Street, S. E., and approximately three houses on each side of these premises were boarded up and had signs on them reading "No Trespassing, Government Property". (TR 6) However, the property in question, 917 - 9th Street, S. E., did not contain any sign indicating that trespassing was forbidden. (TR 6) The aforementioned passage, 917 - 9th Street could be closed by means of double gates in the front of the premises which gate was secured merely by a drop latch device which could be opened or closed at will. (TR 6, and page 2 of the Trial Court Finding of Facts and Conclusions of Law.)

Officer Walker testified that the premises, 917 - 9th Street, S. E., were boarded up. The arresting Officer testified that prior to the condemnations of the buildings the public had used the passageway through 917 - 9th Street, S. E., in going to and from 9th Street.

Officer Walker testified that after placing all three of the subjects under arrest, they were searched and he removed from Appellant's trouser pocket a plastic container with thirty-one (31) gelatin capsules containing a white powder and seventy-five (75) capsules containing a trace of white powder. He also testified that Appellant had in his possession two syringes, two hypodermic needles and a cooker. (TR 7)

The other officer, Robert F. Tewes, testified that on March 14, 1967, he worked with Officer Walker in a scout car. He testified that about 10:30 a.m. they were patrolling south on 9th Street, S. E., when he heard a loud noise, "a banging", and saw that the iron gate at the front of the property was standing open. (TR 14) He further testified that he next saw Officer Walker talking to the Appellant and two others. (TR 15) Officer Tewes testified that he did not see Appellant or his companions enter the building, or in the building. (TR 19) The officer further testified that there was no fence or obstruction blocking the driveway leading to the alley behind 917 - 9th Street, S. E. (TR 23), and that if the unlocked gate were open, it was possible to walk straight through the property into the alley behind it. (TR 20). He further testified that when he asked the

Appellant and his companions what they were doing in the walkway, they testified that they were merely taking a short cut over to E Street. (TR 24) The Officer also testified that there were no signs prohibiting trespassing in the back of 917 - 9th Street. (TR 27) The only no trespassing signs were located on the buildings themselves and not on the walkway area. (TR 28) On pages 30 and 31 of the Transcript the two officers testified that they had received various complaints from the Redevelopment Land Agency inspectors that there were losses and degradation of fixtures in the buildings in question. However, this testimony was entirely hearsay. On page 44 of the Transcript, the following testimony was given:

> THE COURT: Once you went through that gate there, you could go straight through 917 and come out in the open area?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: And if you wanted to go from 9th and K down to 8th and I, there was nothing to stop you except a gate at 917, if you wanted to go through the back and come down the alley?
>
> THE WITNESS: That's right, sir.
>
> THE COURT: And that was before the houses were condemned? If the gate was open at 917, anybody was free, are you telling me, to walk through 917 and come down the alley into I Street?

THE WITNESS: Yes, sir, you could

THE COURT: No fences or other gates in the back of that to keep you from doing that?

THE WITNESS: Not behind the driveway, no, sir.

The police testified that one of the doors at 917 had been partially pried open. However, they did not obeerve the Appellant or his associates pry it open and had no knowledge as to when this plywood had been pried open. (TR 45) Both policemen testified that they did not find any burglary or housebreaking tools or implements on either the Appellant or his two associates. (TR 54)

Carl W. Brooks, a Metropolitan Police Department officer signed to the narcotics squad, testified that he received the items seized from the Appellant for the purpose of transferring them to the chemist. (TR 56-59)

The next witness, Mr. John A. Steele, employed by the Internal Revenue Service as a forensic analytical chemist, specializing in the analysis of narcotic drugs. (TR 60) He testified that the white powder previously referred to as seized from the Appellant, was heroin hydrochloride, a derivative of morphine. (TR 63) On cross examination, Mr. Steele was unable to state whether

or not the amount of narcotics found and analyzed by him would have a narcotic affect on anyone who uses it. The prosecutor objected to the line of questioning on the grounds that the quality of the narcotics is irrelevant and that it is incumbent upon the defendant to raise the qualitative aspect as an "affirmative defense". The Court sustained any further questioning on this line on the grounds stated by the government, to wit, that the defense must show this as an affirmative matter. (TR 69 and 70)

Filed as defendant's Exhibit No. 1 was a transcript of the Trial held in the District of Columbia Court of General Sessions, Criminal Division, in United States vs. LeRoy M. Wilson, and John W. Harper, Criminal Action no. U.S. 2468-67. This trial was held the day after the arrest, March 15, 1967. In this trial, those defendants, who were in the company of the Appellant at the time of his arrest, were charged with unlawful entry of 917 - 9th Street, S. E.

Officer Walker testified that he had observed the Appellant and the two defendants about "20 feet back in this archway (indicating); right at the rear of the building." (Gen. Sess. TR 9) The Court asked the

following question:

> Q Were they underneath the building? As you looked up, would you see the building or would you see --
>
> A They were right at the end of it; yes, sir. Right at the end of this block here (indicating) as though they were going through the building, through this archway. (Gen. Sess. TR 9)

As to the noise, the following testimony took place:

> Q What was the noise you heard? Can you identify that noise more specifically?
>
> A No, sir. It was just a noise I -- it brought to my attention. I knew there was something in there. It could have been from them even walking in there. Say, they hit something. There's a lot of debris and trash in the archway. They could have hit something there that brought my attention. (Gen. Sess TR 10)

The officer also testified that when he first saw the defendants, LeRoy M. Wilson and John W. Harper, and Appellant, they were standing in the archway and appeared to be discussing something when the officer called to them. They approached him without running or attempting to runaway. (TR 11) On page 12 of the General Sessions Court Transcript the following occurred:

> Q Let me ask you this, Officer Walker: Is there a fence or a boundary or anything around these premises?
>
> A Yes, sir.

Q What kind of fence is there, if any?

A It is a metal fence. One of these rod types.

Q And is there an open gate?

A It's opened from the roadway all the way into the archway.

Q So that you can walk right through?

A Yes, sir.

The officer testified that that archway was wide enough for a car to drive through it, which it usually did, and that the archway was about 14 feet wide. (TR 15)

On page 16 of the General Sessions Transcript the following questions occurred:

THE COURT: How would the Government expect to keep anybody out without a fence there?

THE WITNESS: Well, your Honor, I don't know. I know there were signs on there, but I don't know whether the juveniles in the area tore them down.

THE COURT: What did they say? Why did they say they were there?

THE WITNESS: I asked them for identification, and I asked them did they know that this property belonged to the Government, and I charged the --

THE COURT: No. What did they say they were doing?

THE WITNESS: They said they were just walking through the -- going over to the alley.

THE COURT: Police work must be scarce. Not guilty.

THE DEPUTY CLERK: Defendants not guilty.

On the day of Trial counsel made a Motion for the Suppression of Evidence, and introduced into evidence the General Sessions Court Transcript. Counsel raised the res judicata argument as a part of his case, and referred the Court to the Findings of Fact entered by the District of Columbia Court of General Sessions. This Motion was denied. (See page 16 of the Transcript of Pleadings, filed herein.)

On March 20th, 1968, the trial Court made certain findings of fact and conclusions of law. The Court found in paragraph numbered one, that premises 917 - 9th Street, S. E. and adjacent houses were property of the United States on March 14, 1967. All of the houses owned by the United States were boarded up and the two houses on either side of 917 - 9th Street, S. E. had "No Trespassing" signs displayed in front. The Court further found that 917 - 9th Street did not have a "No Trespassing" sign. In paragraph numbered two, the Court found "passage through 917 - 9th Street could be closed

by means of a double gate attached to the front of the premises, however, the only means of securing the gate on March 14, 1967, was a drop latch that could be opened and closed at will." The Court further noted "the back-yard of the premises was approximately twenty feet deep." The arch was not closed off from the public space by a wall or fence. The public space, consisting of a rectangle in the center of the block, opened by a public alley onto I Street, S.E. "The arresting officers had known the public to use the passage way through 917 - 9th Street going to and from 9th Street and the public space and public alley prior to the condemnations." (Court Finding of Facts, paragraph no. 2) In Paragraph numbered four, the Court Findings of Fact, the trial clerk noted that the three were walking toward the public space and public alley when the Officer called to them. The Court concluded that the Officers had "probable cause to arrest the Appellant for attempted unlawful entry of the house of 917 - 9th Street, S. E." The Court concluded that the search of the defendant was incident to a lawful arrest and that the Appellant's Motion for Suppression of Evidence was therefore to be denied. The Court found Appellant guilty as charged in the indictment.

STATUTE INVOLVED

D. C. Code, 1967 Edition, § 4-140. Arrest without Warrant.

> "The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into cusotdy any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District,. . ."

STATEMENT OF POINTS

"Unlawful entry" is a misdemeanor. An officer may arrest for a misdemeanor, without a warrant, only if the violation is committed in his presence or within his view. No violation was committed in the presence or view of the arresting officers in the instant case. The arrest was therefore invalid.

SUMMARY OF ARGUMENT

The trial Court erred when it applied to this case the arrest criteria applicable to a felony, probable cause to believe that a crime had been committed, rather than the misdemeanor criteria. The search was not a valid incident to a lawful arrest.

ARGUMENT

I

The Officers Unlawfully Arrested The Appellant And The Search Incident Thereto Was Therefore Unlawful

Appellant was arrested for "unlawful entry on property of another" as provided by § 22-3102 D. C. Code, 1967 Edition. Unlawful entry, as stated in the Code provision is a misdemeanor.

As provided in § 4-140, D. C. Code, 1967 Edition, a police officer may arrest without a warrant, for a misdemeanor only when the misdemeanor is committed in his presence or in his view. The police officers' testimony at the trial in the United States District Court and at the trial in the District of Columbia Court of General Sessions, which evidence was admitted in the District Court proceedings, clearly shows that the alleged misdemeanor was not committed in the officers' presence nor in their view. Considering the evidence in the light most favorable to the prosecution, the only indication that the officers may have had of an attempted breaking and entering, was the "loud noise" that they heard. However, the officers admitted that this noise could have come from other sources. Thus, there was no certainty,

not even a probability, that the noise emanated from the premises, 917 - 9th Street, S. E. Also, when first seen, the appellant was not located in an area that would support an indication of unlawful entry since the walkway in which he was standing was commonly used by the public. The officers admitted that when they saw the appellant, he was not attempting to enter a building, but was merely standing in the rear of the public walkway. The government cannot contend that the appellant was trespassing in the walkway area, since the officers testified that there were no signs prohibiting the use of the walkway and no obstruction indicating a prohibition. This case clearly involves an arrest for mere investigation purposes. Gatlin v. United States, 117 U.S.App.D.C. 123, 326 F2d 666 (1963)

A recent application of § 4-140, D. C. Code, 1967 Edition, was made in the case of District of Columbia v. Perry, 215 A2d 845 (D.C.App.1966). There, a defendant was chased and stopped by a Maryland police officer who lacked authority to arrest the defendant in the District of Columbia under the terms of the Uniform Act of Fresh Pursuit. After the defendant was stopped, a United States Park Patrol officer was called

to the scene and he arrested the defendant for operating an automobile in excess of the speed limit and while under the influence of intoxicating liquor. The Court held that where the United States Park officer did not observe the defendant driving his automobile, the misdemeanor was not committed within his presence or view and the arrest was therefore unlawful.

The trial Court concluded that the search of appellant which produced the unlawfully possessed narcotics was valid since it was made as an incident to a lawful arrest. The trial Court found that the arrest was lawful because the officers had reasonable cause to believe that a violation of law had been committed. However, the trial Court erred when it applied the criteria for arrest without a warrant in the case of a felony. The trial Court should have ruled that the arrest was proper only if the violation was committed in the officers' presence or within their view, which as a matter of clear fact, it was not. Maghan v. Jerome, 67 U.S. App.D.C. 9, 88 F2d 1001 (1937).

CONCLUSION

Based upon the foregoing, it is submitted that the appellant's arrest was unlawful in that the search was vitiated when conducted pursuant to an unlawful arrest. Therefore, the Motion to suppress the evidence should have been granted and there being no evidence against the appellant, other than the narcotics seized during the search, the judgment of guilty should be reversed.

SISK, LEVITAN, CRAMER & WEINSTEIN

M. Michael Cramer
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036
659-3636

CERTIFICATE OF SERVICE

I hereby certify that this _____ day of _____, 1969, a copy of the foregoing has been mailed, postage prepaid, to the Office of the United States Attorney, United States Court House, 3rd and Constitution Avenue, N. W., Washington, D. C. 20001.

M. Michael Cramer

DLB-N-0[illegible]
4-22-69
(J)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,063

AARON S. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
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Nathan J. Paulson
CLERK

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

Cr. No. 948-67

INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by an asterisk.

ISSUE PRESENTED

In the opinion of appellee, the following issue is presented:

Whether the police had authority to arrest appellant.

This case has not previously been before this Court under the same or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,063

AARON S. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

a) Summary of Proceedings

Appellant, Aaron S. Thomas, was arrested without a warrant on March 14, 1967. By indictment filed August 2, 1967 he was charged with violation of 26 U.S.C. § 4704 (a) (possession of narcotic drugs) and 21 U.S.C. § 174 (facilitation of concealment and sale of narcotic drugs, knowing the same to have been imported contrary to law). On December 22, 1967 a motion to suppress was heard and denied by Judge Howard F. Corcoran. On February

8, 1968, appellant, having waived his right to a trial by jury, was tried before Judge Aubrey E. Robinson. On February 12, appellant was found guilty. This appeal, which raises the sole question of whether appellant's arrest on March 14, 1967 was lawful, followed.

b) The Arrest

At about 10:30 a.m. on March 14, 1967, Officers Walker and Tewes, who were working the 8:00 a.m. to 4:00 p.m. tour of duty in a scout car patrol, arrested, for unlawful entry, appellant and two companions in the back yard of 917 Ninth Street, Southeast (Tr. 3-5). 917 was one of a number of attached row houses on Ninth Street that had been condemned and acquired by the Redevelopment Land Agency in the previous December (Tr. 32, 34). Because the Agency had made numerous complaints to the precinct that vandals had been entering the building and removing fixtures, the police paid particular attention to the buildings in the nine hundred block of Ninth Street (Tr. 5, 6, 31).

The row house at 917, and the three houses on either side of it, had all their doors and windows boarded up with sheets of plywood, and all, but 917, had red, white and blue metal signs affixed to them stating, "No Trespassing, Government Property" (Tr. 6, 15). All the plywood sheeting on the doors and windows, however, bore the same legend, stencilled in black ink, warning against trespassing (Tr. 28-29). 917, unlike its neighbors, had a driveway that ran through the house, giving access to the rear yard of the property, which yard adjoined an alley leading to Eye Street. At the front building line of 917 a two section iron gate, which could be secured with a latch, closed off the mouth of the arch formed by the mouth of the tunnel. (Tr. 14, 19, 20, 23, 40-41, 43-44).

The police were driving south on Ninth Street when their attention was drawn to the property by a noise like the banging of wood (Tr. 14, 32). The iron gate was also standing open, at the time of the previous patrol it had been closed (Tr. 14, 20, 27). As the officers pulled into

the driveway, three individuals were observed walking from the rear of 917 (Tr. 13, 22, 39). When they stopped in response to Officer Walker's command (Tr. 49), they were only a few feet away from the rear door of the premises (Tr. 52). When asked what they were doing there, the appellant said that they were taking a short cut through to a Chinese restaurant on 8th Street (Tr. 23). The driveway had apparently been used as a short cut before the land was condemned (Tr. 20).

The back door, which consisted of a large piece of plywood nailed to the door frame, was pried loose (Tr. 6, 37). The last time that Walker had inspected the premises the door was intact (Tr. 37). The plywood was not completely torn off, but it had been so ripped away from the frame at the bottom that entrance could be gained by pulling back on that part of the board (Tr. 37, 45, 83). The door looked like it had been forced with tools or kicked open (Tr. 25).

Walker put the three under arrest for unlawful entry (Tr. 6). A search of Thomas revealed a plastic container with 31 capsules filled with a white powder (Tr. 7) and a cigarette pack containing 75 similar capsules bearing traces of white powder (Tr. 7, 11). A set of narcotics paraphernalia was also recovered (Tr. 7). At the trial it was learned that the batch of 31 capsules contained heroin hydrochloride, quinine hydrochloride, and mannitol (Tr. 63). After trial the matter was taken under advisement (Tr. 89). By order of March 22, 1968, with accompanying findings of fact and conclusions of law, the trial judge found that the arresting officer had probable cause to arrest appellant for attempted unlawful entry, and found appellant guilty on both counts.

ARGUMENT

Appellant was lawfully arrested.

(Tr. 5, 6, 13, 14, 20, 22, 25, 27, 31, 32, 37, 39, 45, 52, 83)

Appellant asserts that because the offense for which he was arrested, unlawful entry,[1] was not committed in the arresting officer's presence,[2] his arrest was unlawful. Implied in this assertion is an admission that but for the statutory disability the arrest would have been lawful, i.e., that Officer Walker had reasonable grounds for a belief that the offense had been committed.[3] In the arrest context "'[p]resence' means consciousness through the senses"[4] and is much broader in connotation than a requirement that an offense be committed or attempted in a police officer's "view".[5] "The probable cause which will justify arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time through the senses, or inferences properly to be drawn from the testimony of the senses." *Garske* v. *United States*, 1 F.2d 620, 622-623 (CA 8th, 1924). Here, since any reasonable cause for belief that an entry had

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[1] This offense, formally called *Unlawful Entry on Property*, includes attempts to commit the offense. See 22 D.C. Code § 3102 (1967, ed.)

[2] ". . . members of the police force shall have . . . authority to immediately arrest, without a warrant, . . . any person who shall commit . . . or attempt to commit, in the presence of such member, or within his view, any . . . offense directly prohibited by Act of Congress . . ." 4 D.C. Code § 140 (1967, ed.). This section was amended on December 27, 1967 to permit arrests for unlawful entry even though not committed in a police officer's presence. See 22 D.C. Code § 140(b)(c) (1968, ed.). The change was designed to give arrest authority to the police officer who arrives on the scene after the offense is committed. See 3 D.C. Code Leg. Serv. '67, page 554.

[3] See *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967) and 23 D.C. Code § 306 (1967, ed.).

[4] *Arrest Without a Warrant*, 22 Mich. L.R. 673, 680 (1924).

[5] 5 Am. Jur. 2d, *Arrest*, 31.

been made or attempted could have been the product only of what the officer heard and saw, as he was not acting on any report of a crime,[6] the crime of unlawful entry was necessarily committed in his presence.

Even putting aside the result that can be deduced from the implication in appellant's assertion, i.e. that "reasonabel grounds for belief" existed, Officer Walker had sufficient facts before him, considering what he heard and what he saw, as a reasonably prudent police officer to come to the conclusion that he had witnessed the commission of an attempted entry. *Henry* v. *United States*, 361 U.S. 98 (1959).[7] He heard a sound like banging wood as he drove by the boarded up building at 907 Ninth Street, S.E. (Tr. 14, 32). During patrols special attention was paid to that building and its companions because they had been the object of vandals (Tr. 5, 6, 31). The gate leading to the rear of the premises was open, previously it had been closed (Tr. 14, 20, 27). Appellant and an accompanying pair were seen in the back yard a few feet from the rear door of the building (Tr. 13, 22, 39, 52); from this door the plywood cover which sealed it was pried loose so that access to the inside could be gained merely by pulling back the plywood and holding it open (Tr. 6, 37, 45, 83). The last time Walker had inspected the premises the door was intact (Tr. 37). The door looked like it had been forced with tools or kicked open (Tr. 25).

Not to be overlooked in considering the lawfulness of the arrest is that the offense articulated by the arresting officer as the reason he is taking an individual into custody does not circumscribe the scope of the inquiry into the lawfulness of his action. As noted in *Bell* v. *United States*, "The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a

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[6] Compare *Daniels* v. *United States*, —— U.S. App. D.C. ——, 393 F.2d 359 (1968).

[7] See also *Carroll* v. *United States*, 267 U.S. 132 (1924).

felony had been committed . . ." [8] Clearly Officer Walker ". . . in light of the circumstances of the moment as viewed through his eyes . . ." [9] could reasonably believe that a felony such as *Housebreaking*, 22 D.C. Code § 1801 (1967, ed.), or *Depradation of Fixtures*, 22 D.C. Code § 3102 (1967, ed.), had been committed; as the circumstances presented a rational basis for a surmise that the group had just left the building. This being the case, even if an attempt to enter unlawfully was not committed in Walker's "presence", the arrest was still lawful.[10]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

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[8] 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86 (1958).

[9] *Bell* v. *United States*, *supra* note 8, 102 U.S. App. D.C. at 388, 254 F.2d at 87.

[10] Since evidence required to establish guilt beyond a reasonable doubt is not a predicate for arrest, the fact that appellant's companions were found not guilty of unlawful entry is not dispositive. *Brinegar* v. *United States*, 338 U.S. 160 (1949).

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